Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	**MM Docket No. 01-317**
Definition of Radio Markets	)	**MM Docket No. 00-244**

SUPPLEMENTAL COMMENTS

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Summary

Cumulus Media Inc. ("Cumulus") hereby files its Supplemental Comments on those studies (the "Media Studies") generated by the Commission's Media Ownership Working Group.

The Media Studies provide some support for the conclusion that radio, television and daily newspapers are often regarded by the public and advertisers as substitutes for one another in the provision of news and other information and for advertising purposes. For example, surveys by Neilsen Media Research show that the public would shift to radio if television and daily newspapers were not available as a source of news and information and, conversely, that radio listeners would shift to television and newspapers if radio were not available to provide news and information. In advertising, however, the Media Studies showed only a small (and in some cases non-existent) substitutability among radio, television and daily newspapers.

Although useful in many respects, the Media Studies suffer from a common defect: a lack of empirical experience and data. To help fill that void, Cumulus's Supplemental Comments provide information from its experience in the Florence, South Carolina and Rockford, Illinois markets, two of the representative markets selected by the Commission in its *Notice of Proposed Rulemaking*. In those two markets, Cumulus has encountered fierce competition between and among radio stations, television stations and the daily newspaper. That experience confirms that many advertisers can and will shift their business from one media to the other. Consequently, it cannot be said that radio is an advertising market by itself independent of other media.

That conclusion bears upon the analytical framework the Commission should apply in deciding whether to process radio mergers. In its earlier comments, Cumulus advocated strict reliance on the numerical limits of ownership set forth in the Communications Act of 1934, as

amended, 47 U.S.C. § 151 *et. seq.*, and Commission rules. However, if the Commission nonetheless feels compelled to adopt a broader perspective, the analytical framework should account for the real world competition which radio station owners confront. More specifically, given the competition between and among the different media, the Commission should not flag a transaction unless the post-consummation market would result in (1) the newly-merged radio owner controlling more than 65 percent of the *radio* advertising dollars and (2) fewer than six (6) independent media voices (among radio, television and daily newspapers). That framework will enable the Commission to focus its attention on those situations which are likely to result in competitive harm to consumers and advertisers (although, as in the past, the Commission can and should address those other transactions which become subject to a petition to deny or other complaint).

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To: The Commission

SUPPLEMENTAL COMMENTS

Cumulus Media Inc. ("Cumulus"), acting pursuant to the Commission's Public Notice of October 1, 2002 (DA 02-2476), hereby files its Supplemental Comments on those studies (the "Media Studies") generated by the Commission's Media Ownership Working Group.

Introduction

The Media Studies provide some support for the conclusion that radio, television, and daily newspapers are often viewed by the public and advertisers as substitutes for one another in the provision of news and other information and for advertising purposes. The studies further confirm that consolidation in the radio industry has not produced any material adverse effects and, to some extent, has benefited the public. For example, one study showed that "greater ownership by large national radio firms led to lower local radio advertising prices for regional and national advertising agencies." K. Brown & G. Williams, "Consolidation and Advertising Prices in Local Radio Markets" (September 2002) at 19. Another study concluded that, in the larger markets at least, "recent consolidation has played very little role in playlist diversity . . ." G. Williams, K. Brown & P. Alexander, "Radio Market Structure and Music Diversity" (September 2002) at 18. Stated another way, consolidation has not decreased the amount of music diversity available to the listening public.

To a large extent, however, the Media Studies leave unanswered one of the basic questions presented by the instant rulemaking proceedings: the extent to which radio, television, and newspapers compete with each other. One study found that there was little, if any, substitutability among advertisers with respect to the radio, television, and newspapers. At the same time, some public opinion surveys found that radio, television, and newspapers provide considerable substitutability for those members of the public who want access to news and information. However, nowhere did the Media Studies provide a comprehensive analysis of the extent to which consumers and advertisers regard radio, television and newspapers as alternative sources of advertising, information, and entertainment.

Although they do provide useful information, the Media Studies generally suffer from a fundamental shortcoming in addressing questions related to advertising, playlists, and access to news and information: a lack of empirical experience. To help remedy that shortcoming, these Supplemental Comments provide information from the real world experiences of Cumulus's stations in the Rockford, Illinois and Florence, South Carolina markets, which constitute two of the three representative markets identified by the Commission's *Notice of Proposed Rulemaking* in the instant matter. *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861, 19884-85 (2001). That real world experience demonstrates that radio, television, and daily newspapers are engaged in vigorous competition for consumers and advertisers. There is no reason to believe that that experience is unique to those two markets (and, hopefully, the Commission will receive evidence from other radio companies that mirrors Cumulus's experience).

The substantial substitutability of radio with newspapers and television bears upon any framework of analysis that the Commission might adopt for radio transactions. Although Cumulus favors strict reliance on the numerical limits set forth in the Communications Act of 1934, as amended, (the "Act"), 47 U.S.C. § 151 *et seq.*, and the Commission's rules, it is recognized that the Commission might decide to adopt a broader approach. In that latter event, the Commission should adopt an analytical framework that comports with the real world that radio station owners confront when trying to satisfy the listeners' need for news and information and in trying to lure advertisers to their particular station(s). More specifically, the Commission should adopt a standard that would allow radio mergers and other transactions to proceed without further scrutiny if they are otherwise in compliance with the numerical limits and the transaction would not result in (1) the newly-merged radio station owner controlling more than 65 percent of the radio advertising dollars in the particular market, and (2) fewer than six (6) independent media voices (radio, daily newspapers, and full power television stations) in the market.

Although anticompetitive concerns could conceivably arise in situations where the percentage of radio advertising dollars is lower or the number of media voices is greater, in those circumstances the Commission can and should rely on competitors and the public to voice any such concerns through a petition to deny or other complaint. In the absence of any petition to deny or other complaint, the Commission should assume that no anticompetitive concerns are warranted in those latter circumstances.

I. Media Studies Support Broader Definition of Market

As the Commission recognized, a starting point in any competition analysis is the definition of the relevant product market in which radio stations compete. *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd at 19880. As one authoritative publication observed,

> The boundaries of a relevant product market are determined principally by the reasonable interchangeability of use of products; products that are reasonably interchangeable in use generally compete with each other and are thus included in the same market. Products may also be included in the same market if producers of one product can quickly and cheaply shift to the other product in response to a higher price for that product. . . . .

American Bar Association, Section on Antitrust Law, *Antitrust Law Developments* 233 (4th Edition 1997) (footnotes omitted). In essence, then, the product market is defined by that group of products which can be generally substituted for one another.

In this context, the obvious task is to describe "those groups of producers which, because of the similarity of their products, have the ability – actual or potential – to take significant amounts of business away from each other." *SmithKline Corp. v. Lilly & Company,* 575 F.2d 1056, 1063 (3rd Cir.), *cert. denied*, 437 U.S. 838 (1978). The *Merger Guidelines* of the Department of Justice ("DOJ") similarly focus on those products that can be deemed to be substitutes for each other. Under the *Merger Guidelines*, the relevant product market is deemed to be the most narrow set of products or services for which an anticompetitive price increase could be profitably sustained. In other words, a radio transaction could be deemed to be anticompetitive if one of the participants could profitably impose a small but significant increase in advertising rates on a permanent basis. *Merger Guidelines*, §1.1. In considering the latter possibility, the *Merger Guidelines* urge consideration of "evidence that buyers have shifted or have considered shifting purchases between products. . . ." *Id.*

Although the DOJ and the Commission have previously taken the position that radio is a separate product market, the Media Studies provide some evidence to suggest otherwise. Using data from five different sources, for example, one study concluded that there is "evidence of substitution by consumers and among certain media outlets" and specifically found evidence of such substitution between radio, television and newspapers (albeit of varying strengths). J. Waldfogel, "Consumer Substitution of Among Media" (September 2002) at 3. *See id.* at 21-24, 33-34. As the study stated at one point, for example, there is "evidence of substitution . . . between radio and broadcast TV for news consumption." *Id.* at 39.

A separate "Consumer Survey on Media Usage" conducted by Nielsen Media Research ("Nielsen") confirmed those preliminary findings with respect to the substitutability of radio, television and daily newspapers. The Nielsen survey showed (1) that 35.3 percent of the respondents used radio as their primary source for local news and current affairs (as opposed to 84.8 percent for television and 62.8 percent for newspapers), (2) that a similar breakdown applies to the use of media for national news and current affairs, (3) that 73.8 percent of the respondents are more likely to use radio for news and current affairs if broadcast television were not available, (4) that 68.7 percent of the respondents are more likely to use radio as a source of news and current affairs if cable and satellite news channels were not available, (5) that 64.7 percent of the respondents are more likely to use radio as a source of news and current affairs if the Internet were no longer available, (6) that 64.3 percent of the respondents are more likely to use radio as a source of news and current affairs if a daily newspaper were not available, and (7) that 62.5 percent of the respondents are more likely to use a daily newspaper for news and current affairs if radio were not available. Nielsen Media Research, "Consumer Survey on Media Usage," (September 2002) at Tables 001, 009, 020, 026, 032, 038, 050, 057, 058 & 061.

The apparent substitutability of radio with television and daily newspapers for news and information no doubt helps to account for the absence of any material change in radio advertising rates occasioned by consolidation in the radio industry. One Media Study concluded that advertising rates actually decreased for local radio advertising to national and regional advertising agencies in those markets dominated by larger radio companies. K. Brown & T. Williams, "Consolidation and Advertising Prices in Local Radio Markets" (September 2002) at 2, 19. As the study explains, "The latter finding implies that national radio companies may sell more local advertising time to national and regional advertising agencies, which may also mean that these national companies sell less local radio advertising time to local businesses." *Id*. at 17.

That latter finding says nothing explicit about the substitutability between or among radio, television and daily newspapers for advertisers. That subject was addressed by another study which found only "weak substitutability between local media and the sales activities of local businesses." C. A. Bush, "On the Substitutability of Local Newspaper, Radio and Television Advertising in Local Business Sales" (September 2002) at 12. According to that study, there is a "very small but statistically significant" correlation between newspaper retail ads and local radio ads, while the elasticity between local radio ads and local television ads is "not statistically different from zero." *Id*. at 12. In providing those findings, however, the study cautioned that there were inherent limitations in the underlying data and that other data could impact the conclusions (although the study added that its findings were not "inconsistent with economic theory and do not appear unreasonable"). *Id*. at 14.

There are two obvious limitations with the last study on local advertising: (1) as the study itself acknowledged, there are inherent limits to the underlying data and (2) this study, like the others, is based largely on economic theory and statistical surveys whose margin for error appears to be considerable. Those limitations underscore the importance of the Commission's request for empirical data that could shed further light on whether the findings and conclusions of its Media Studies comport with the real world. *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd at 19880. In response, Cumulus has secured information and other data from the operations of its stations in the Rockford, Illinois and Florence, South Carolina markets. That information demonstrates that – whatever the statistical and theoretical conclusions of the Media Studies – radio is engaged in vigorous competition with television and daily newspapers for consumers and advertising.

II. Cumulus's Experience in the Rockford and Florence Markets

That radio competes for advertising dollars with both television and newspapers is confirmed by Cumulus's experience in the Florence, South Carolina and Rockford, Illinois markets. In those markets – as in all of the markets in which Cumulus operates radio stations – its radio stations compete with television and newspapers for advertisers and consumers.

A. Florence, South Carolina Market

1. Market Competitors

There are 16 radio stations and three major radio broadcast groups in the Florence market: Cumulus, Root Communications Group L.P., and Miller Communications Inc. Cumulus operates seven stations in the market: WHLZ-FM, WWSN-FM, WFSF-FM, WMXT-FM , WYNN-FM, WBZF-FM, and WYNN-AM.

The television stations in the Florence market are part of the Myrtle Beach-Florence, South Carolina Designated Market Area ("DMA"). Each of the four the major television networks has an affiliate in the market. The WB Television Network and UPN also have affiliates in the market, and all of the television stations have studios from which their respective account executives operate. The number one rated television station in the market, WBTW (the CBS affiliate), operates studios in both Florence and Myrtle Beach.

The only daily newspaper in Florence is the *Morning News*. In addition to its daily edition, the *Morning News* publishes several other weekly periodicals throughout the community.

2. Competition in the Florence Market

The nature and scope of media competition in the Florence market is confirmed by Cumulus Market Manager Rick Howze, whose declaration is annexed hereto to Exhibit A.

Cumulus's stations in the Florence market compete against both television and the *Morning News* in trying to attract both advertisers and listeners. Cumulus specifically targets companies which buy newspaper and television advertising and, conversely, frequently has its advertisers approached by newspaper and television sales forces. In response to this direct competition, Cumulus's marketing materials, a copy of which are annexed hereto as Exhibit B, expressly address the advantages an advertiser will secure by placing its advertisements with radio instead of the daily newspaper.

Those marketing materials do not ensure success. Cumulus recently lost a significant portion of the business of one major advertiser, Raceway Automotive, which operates several automobile part dealerships, to the local newspaper. Cumulus's sales force is now actively engaged in an effort not only to regain that lost business but also to secure Raceway advertising dollars that are now spent on newspapers as well as television.

Luring advertisers away from the local television stations is a more complicated matter because the Florence market's television stations reach a broader audience (in two different radio markets) than Cumulus's radio stations. As a result, the marketing comparisons with television have to take into account the needs of the particular advertiser and cannot be addressed on a generic basis in the same way that Cumulus's account executives can compare the reach of radio with the reach of the community's only daily newspaper.

Car dealerships provide an apt example of an instance in which television can and does compete with radio for advertising dollars. For example, in 2002, Kia of Florence spent all of its advertising budget (estimated to be approximately $30,000 per month), on radio advertising, of which Cumulus had a considerable share. However, beginning with the first quarter of 2003, the dealership has shifted all of its advertising dollars to television. Cumulus also lost the business of Goody's, a clothing retailer, DPI Teleconnect, a telecommunications company, and Aaron's Rental, a rent-to-own business, when each of those companies shifted their advertising budget from radio to television.

Of course, the competition for advertising dollars is a two-way street. For example, Cumulus was recently able to acquire the advertising of Axle Express, an automotive repair shop, and of Stuckey Auto Parts, both of whom had previously placed their advertising budget with the local CBS affiliate, WBTW. Cumulus is also in the process of making sales presentations to Palmetto Tire, which historically has spent its advertising budget on both television and radio, in an effort to convince Palmetto to shift all of its advertising to Cumulus's radio stations.

The foregoing experience highlights the marketplace reality that radio and television compete for many of the same advertisers and that those advertisers regard the two media as alternatives for their advertising dollars. In Cumulus' experience, its success in competing with television stations sometimes depends on the time of year: Cumulus has often been able to convince advertisers to switch from television to radio in the warmer months when people are more likely to be outside or in their cars on vacation trips (rather than inside watching television).

B. Rockford, Illinois Market

1. The Competitors

There are nine principal radio stations in the Rockford, Illinois Arbitron market and another 15 whose signals reach the market. Most of the nine principal stations are owned by two radio groups: Cumulus and RadioWorks, Inc. Cumulus operates four stations in the market: WZOK-FM, WROK-AM, WXXQ-FM, and WKMQ-FM.

Each of the four major television networks has an affiliate in the market: WTVO (ABC), WIFR (CBS), WREX (NBC), and WQFR (Fox).

There is one daily newspaper in Rockford, the *Rockford Register Star*.

2. Competition in the Rockford Market

The nature and scope of competition in the Rockford market is confirmed by Cumulus Market Manager Greg Sher, whose declaration is annexed hereto as Exhibit C.

Cumulus's sales force actively competes with the local daily newspaper and local television stations. This competition is largely a function of the fungability of advertisers' marketing budgets. Advertisers in the Rockford market typically do not have separate advertising budgets for the various media. Rather, businesses usually have a certain amount of money set aside for advertising, and they will spend that money on whatever media they are convinced will generate the best returns.

Two examples highlight Cumulus's direct competition with television and the daily newspaper. The first example concerns Bachrodt Pontiac-GMC, the largest GMC dealer in the Rockford market. Historically, the dealership devoted all of its monthly advertising budget (estimated to be $25,000 to $30,000) to television. In early 2002, two of Cumulus's account executives noticed Bachrodt's heavy television advertising and began making sales calls on the dealership's owner and manager as well as its Chicago-based advertising agency. The Cumulus representatives highlighted the relative advantages of radio over television. The end result reflected the substitutability of media for this particular advertiser: in the Spring of 2002, Bachrodt shifted all of its television advertising dollars to radio.

A similar experience involved the CherryVale Mall, the largest shopping mall in the Rockford market. The mall traditionally advertised only in Rockford's daily and weekly newspapers. During the 2001 holiday season, for example, the mall spent approximately $5,000 on newspaper advertising and nothing on radio advertising. Over the course of 2002, Cumulus's account executives met with CherryVale's marketing director to discuss how radio advertising could better meet the mall's advertising needs. A copy of the presentation made to CherryVale is attached hereto as Exhibit D. This effort likewise demonstrated the substitutability of media for a local advertiser: CherryVale shifted all of its 2002 holiday season advertising to radio.

These two examples are merely the tip of the iceberg in a continuing battle for advertisers between and among radio stations, television stations, and newspapers in the Rockford market. Sometimes the effort results in a loss of advertising dollars for Cumulus; on other occasions, the shift is toward radio and away from those other media. But in either event, the perspective of the advertiser remains unchanged: all of the media compete with each other, and each knows that significant increases in advertising rates in one medium could force the advertiser to move some or all of its advertising dollars to another medium.

III. Alternative Framework of Analysis

In its initial Comments in the instant proceeding, Cumulus explained why the Commission should rely exclusively on the current numerical limits set forth in the Act and Commission rules in determining whether any radio transaction can be processed. Comments of Cumulus Media Inc. (March 27, 2002) at 15-26. Nothing in the Media Studies or in Cumulus's experience in the Rockford, Illinois and Florence, South Carolina markets justifies any deviation from that position. The Commission may nonetheless conclude that it can and should review facts and circumstances that extend beyond compliance with those numerical limits. If and when the Commission should make that determination, Cumulus proposes that the Commission adopt a framework of analysis that balances its obligations to protect the public interest with the competitive realities that confront radio station owners.

In crafting that framework, certain basic presumptions should be taken into account. As a starting point, it should be recognized that competitive concerns are only likely to be raised in smaller markets. It is inconceivable, for example, that any one radio group owner in New York, Los Angeles, or any of the top 50 markets will be able to garner a level of radio advertising dollars that would trigger any concern on the Commission's part. At the same time, it is in those smaller markets where consolidation is needed most from the public's perspective. As Cumulus explained in its earlier Comments, consolidation in the smaller markets fosters the kinds of efficiencies that enable the group owner to improve the quality of the technical facilities, hire capable staff, and provide quality programming that is responsive to the community's needs and interests. As Cumulus also explained, it is almost inevitable that there will only be two principal group owners in smaller markets who can achieve those efficiencies and really compete with each other.

The second fundamental premise is equally important: there is nothing inherently anticompetitive with two large group owners controlling the vast majority or even all of the *radio* advertising revenues in a medium or smaller market. It should be remembered that the FCC accepted a duopoly in the provision of cellular telephone service for more than a decade without any adverse consequences to the public interest. To the extent there is any concern with the competitive impact of a duopoly of radio station owners, it is more than offset by the presence of other media that compete with radio. Stated another way, a group owner with more than 50 percent of the *radio* advertising dollars cannot, to paraphrase the DOJ's *Merger Guidelines*, institute a small but significant price increase on a permanent basis without fear that business will be taken away by the other radio group owner or by television or daily newspapers.

To be sure, there may be some advertisers for whom radio advertising is an inelastic situation; but no court or other authority (including the DOJ *Merger Guidelines*) has required elasticity among *all* consumers (in this case advertisers) as a prerequisite to a definition of the applicable product market; it is enough if there is substantial elasticity among consumers. For that reason, radio should not be treated as a separate advertising market merely because some advertisers will not find radio, television, and daily newspapers as adequate substitutes for one another.

This perspective can be tied to the competitive situations described in the Rockford, Illinois and Florence, South Carolina markets. Neither Cumulus nor any other radio group owner can afford to institute a small but significantly permanent price increase in advertising rates merely because some (and perhaps even many) advertisers will be forced to accept it. In every instance, the benefits of the increase with respect to those "inelastic" advertisers will be more than offset by the loss of other advertisers who will take their business to other media who can offer better rates to reach the chosen demographic group.

The third and most telling presumption is that radio competitors will not stand idly by if a situation will threaten their economic livelihood. For that reason, the Commission can and should rely on the petition to deny and complaint process to focus its attention on those situations where there are legitimate and real-world grounds for concern (although, as in the past, the mere filing of a petition to deny or complaint does not necessarily mean there is any legitimate basis for any alleged anticompetitive concern).

In view of the foregoing presumptions, the Commission should adopt the following analytical framework in the event that it is compelled to review radio transactions on a case-by-case basis even where there is compliance with the numerical limits in the Act and the rules: a transaction should not be flagged unless consummation would result in (1) the newly-merged radio owner controlling more than 65 percent of the radio advertising dollars, thus implying that the newly-expanded radio group owner has substantially more strength than its other competitor(s), and (2) fewer than six (6) independent media voices among radio, full power television stations, and daily newspapers. If there are at least two (2) radio station owners and six (6) independent media voices, the market will have a competitive situation where a small but significant increase by one radio station owner is likely to result in the loss of business to either the other group radio owner or the other media.[1]

[1] Of course, this framework would not trigger any concern if one radio station owner already has more than 65 percent of the radio advertising dollars (through growth or otherwise)

Application of the foregoing framework, of course, would not preclude the Commission from considering petitions to deny or other complaints which present particular circumstances or facts which would justify a Commission finding that the other radio group owner does not provide any competition or that there are other circumstances which preclude a finding that other media provide any meaningful competition. However, the threshold for demonstrating competitive harm in those latter situations should be one that accounts for the practical realities of the particular market.

The foregoing framework will significantly reduce the number of transactions that are flagged and will enable the Commission (as well as the public) to focus on those transactions which might pose anticompetitive concerns from a real-world perspective. The proposed framework will also enable the Commission to help insure that its legal analysis is tied to the real world probabilities that a particular transaction could lead to anticompetitive harm to advertisers and consumers.

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and another radio owner in the market seeks to acquire the other radio stations in the market (so that the market would be left with two radio competitors).

Conclusion

WHEREFORE, in view of the foregoing and the earlier comments of Cumulus as well as the entire record herein, it is respectfully requested that the Commission rely on the numerical limits in the Act and in Commission rules in determining whether radio transactions should be processed or, in the alternative, that the Commission adopt the case-by-case method proposed in these Supplemental Comments.

Respectfully Submitted,

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EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D